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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN TYRONE KING, Defendant and Appellant.	E034034 (Super.Ct.No. FVI 013220) OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Ronda Norris, under appointment of the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gil P. Gonzalez, Supervising Deputy Attorney General, and Andrew S. Mestman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jonathan Tyrone King appeals from his conviction of felony corporal injury of a child and two counts of felony child abuse on the grounds that his conviction was not supported by substantial evidence, and the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of misdemeanor child abuse. In a supplemental brief, defendant argues that the trial court erred in imposing a sentence greater than could be imposed on the basis of facts found by the jury beyond a reasonable doubt. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Defendant was charged in an information in count 1 with felony child abuse of T. J. (Pen. Code,[1] § 273a, subd. (a)); in count 2 with felony corporal injury of T. (§ 273d, subd. (a)); and in count 3 with felony child abuse of B. B. (§ 273a, subd. (a)). It was specially alleged that defendant personally inflicted great bodily injury to T. causing brain injury and paralysis (§ 12022.7, subd. (b)). It was also specially alleged that defendant had a prior strike offense (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(d)) and that defendant had previously served a prison term (§ 667.5, subd. (b)).

A jury found defendant guilty on all counts and found the great bodily injury allegation to be true. In a bifurcated proceeding, the trial court found the prior strike and prison term allegations to be true. The trial court sentenced defendant to 23 years 4 months in prison, which included (1) the aggravated term of 12 years (six years doubled under the "two strikes" law) for count 1 plus a five-year enhancement for the great bodily

[1] All further statutory references are to the Penal Code unless otherwise indicated.

injury allegation and a one-year prior prison term enhancement; (2) a consecutive term of 2 years 8 months (one-third the middle term of four years doubled under the "two strikes" law) for count 2; and (3) a consecutive term of 2 years 8 months (one-third the middle term of four years doubled under the "two strikes" law) for count 3.

Counts 1 and 2

Because defendant does not raise any contentions on appeal with respect to his convictions of counts 1 and 2, the statement of facts with respect to those counts will be abbreviated. Defendant lived with Jennifer B. (hereafter, mother) and her two children, two-year-old T. and six-year-old B. On April 5, 2001, defendant called 911 and told the operator that T. had fallen off the toilet and bumped her head. Paramedics responding to the call found T. unconscious. She had a bump on her head above her right ear with an internal pooling of blood below that area. T. was airlifted to the hospital, in critical condition, where she underwent surgery, including removal of portions of her brain, to alleviate swelling in her brain. She later had more surgeries to replace and reposition bone that had been removed in the initial surgery. Her injuries were permanent and disabling, including paralysis of her left side. She can walk with a limp with splints on her leg. The surgical removal of significant portions of her brain has affected her intellectual functioning and her memory.

The neurosurgeon testified that T.'s injuries were not consistent with a child falling off a toilet, but were more similar to injuries sustained in a "massive car crash" or in falling off a three-story building. A physician who testified as an expert on "shaken baby or shaken impact syndrome" testified that in her opinion, T.'s injuries had been

caused by her having been shaken by a much larger person so that her brain moved around in her skull causing brain swelling and bleeding in and around the brain.

T. also had swelling of her eye in a "loop shape," which is generally caused by being struck by a cord or belt that has been folded over. She had a small bruise in her left eye, usually caused by direct impact, and fresh mouth injuries, including a laceration, bruising, and bleeding.

A medical examination of T. showed loop marks on her left thigh and an older, healing injury that had been caused by an object such as a belt or cord and probably a belt buckle in the left groin area. Defendant had spanked T. with a belt a couple of months before April 2001 and had caused a scar on T.'s hip and groin area. That spanking was the basis for count 1.

Count 3

B., who was eight years old at the time of trial, testified that defendant used to hit him hard on the hip with a belt. B. could not remember how many times defendant had hit him, but it was "a lot of times" and "[e]very single day." B. had earlier told a police officer that defendant had hit him about 10 times. It had hurt when defendant had hit him, and B. had cried. Mother had also hit him with a belt, her hand, and a wooden spoon.

B. had told the police officer that defendant had hit him in the head and that defendant had whipped him a lot on the bottom, hands, knees, and feet. Defendant had whipped B. after B. tried to tell his grandfather what had happened to T. Defendant had also beaten B. on the hip and back with an electric cord. Defendant sometimes beat B.

for no good reason. B. had had bruises and marks "all over me" after the beatings, and he had seen "big bumps" on his body. Defendant had once beaten B. because B. had accidentally bumped his head on the table. When defendant beat B., mother sometimes just sat and watched.

A pediatrician specializing in child abuse examined B. on April 16, 2001. B. had scars below his nose, on his lower lip, and on his shin that B. attributed to beatings by defendant. The physician could not definitely say that the scars had been caused by child abuse; they could have been due to accidents.

Defendant testified that he had spanked B. only once, in December 2000. Defendant had used his hand, and he had struck B. about six times. He had never struck B. after that, and he had never used anything other than his hand on B.

DISCUSSION

I. Sufficiency of Evidence

Defendant contends that the evidence was insufficient to support his conviction for felony child abuse in count 3. Defendant argues that B.'s accounts of what had happened were inconsistent with respect to the circumstances, frequency, and severity of the whippings defendant had inflicted, and B.'s testimony was therefore not believable.

When a defendant challenges the sufficiency of evidence to support a criminal conviction, this court asks whether the evidence, considered as a whole, was sufficient to permit a reasonable trier of fact to conclude that the defendant was guilty of the crime beyond a reasonable doubt. (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) We review the evidence in the light most favorable to the verdict and presume every fact in support of

the judgment that could reasonably have been deduced from the evidence. (*Rayford*, *supra*, at p. 23.) We do not reweigh the evidence or reassess the credibility of witnesses, but merely determine whether the record contains sufficient evidence to warrant the inference of guilt drawn by the trier of fact; thus, we reject evidence credited by the trier of fact only if it is inherently improbable or impossible. (*People v. Sanchez* (1995) 12 Cal.4th 1, 31-32; *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1561.)

A physician observed scars on B.'s lip and shin, and B. told the physician that the scars had resulted from defendant having hit him. B. told a police officer that defendant had struck him on the head and had "whooped" him 10 or 11 times with a belt and with his hands on B.'s bottom, hands, knees, and foot. He told the officer that defendant "hits real hard." At trial, he testified that defendant had hit him "hard" with a belt on the hip on many occasions; it had hurt, and B. had cried. Defendant had also hit him with an electric cord on the back and hip, and B. got bruises, marks, and "big bumps" on his body where defendant hit him.

These statements and testimony were sufficient to support defendant's conviction of felony child abuse. Such a conviction does not require actual injury, but rather requires a showing that "'. . . the attendant circumstances make great bodily injury likely . . . .'" (*People v. Lee* (1991) 234 Cal.App.3d 1214, 1220.) Here, B. was only six years old at the time defendant committed the offenses. The jury could reasonably conclude that a large adult (the probation report indicates that defendant is six feet, one inch tall and weighs 210 pounds) administering whippings to a child with a belt and electric cord carried a likelihood of inflicting great bodily injury. In addition, B.'s

testimony and pretrial statements amply support the jury's finding that defendant directly and willfully inflicted unjustifiable physical pain on B. by hitting and whipping him. Although B. gave somewhat differing versions of events in his trial testimony and in pretrial statements, his statements and testimony were not inherently incredible or impossible. The jury found B. to be credible, and we do not disturb that finding on appeal. Defendant's contention that the evidence was insufficient to support his conviction is meritless.

II. Instruction

Defendant also contends that the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of misdemeanor child abuse under section 273a, subdivision (b).[2] Misdemeanor child abuse is a lesser included offense of felony child abuse under section 273a, subdivision (a).[3] (See *People v. Lofink* (1988) 206 Cal.App.3d 161, 168.)

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[2] Section 273a, subdivision (b) provides as follows: "Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

[3] Section 273a, subdivision (a) provides as follows: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years."

The trial court is required to instruct on lesser included offenses only when the evidence raises a question whether all the elements of the charged offense have been proven and when there is evidence that would justify a conviction of the lesser crime. (*People v. Breverman* (1998) 19 Cal.4th 142, 148.) The trial court is not required to instruct on lesser included offenses when the evidence does not support a conviction of the lesser offense or when the defendant, if guilty at all, could only be guilty of the greater offense. (*People v. Hawkins* (1995) 10 Cal.4th 920, 953, abrogated on another ground in *People v. Lasko* (2000) 23 Cal.4th 101.)

Here, even assuming the trial court erred in failing to instruct on misdemeanor child abuse, any error was harmless. The Supreme Court has announced that the *Watson*[4] standard of review applies to error in failing to instruct on lesser included offenses: "We conclude that the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. We further determine, in line with recent authority, that such misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (Cal. Const., art. VI, § 13; *Watson*, *supra*, 46 Cal.2d 818, 836.)" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.)

Here, the jury was given the option of finding defendant guilty of the lesser included offense of misdemeanor battery, which is defined as the willful and unlawful

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[4] From *People v. Watson* (1956) 46 Cal.2d 818, 836.

use of force upon another. The jury rejected this option, finding defendant guilty of felony child abuse. The evidence showed that defendant repeatedly struck B. with his hands, a belt, and an electric cord. B. told a physician that scars on his face and ankle resulted from the beatings. Based on this evidence, we conclude that it is not reasonably probable that any error in failing to instruct the jury on misdemeanor child abuse affected the outcome of the case. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 165.)

III. Sentencing

Citing *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531, 159 L.Ed.2d 403], defendant contends the trial court deprived him of his constitutional rights to a jury trial and due process when it imposed the five-year upper term on his robbery conviction.

In *People v. Wagener* (2004) 123 Cal.App.4th 424, Division One of this court held that "California's sentencing scheme is consistent with and does not offend the constitutional concerns addressed in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466, 483 [147 L.Ed.2d 435, 120 S.Ct. 2348]] and its progeny, *Blakely* [*v. Washington* (2004) 542 U.S. __ [159 L.Ed.2d 403, 124 S.Ct. 2531]]." (*Wagener,* at p. 430, fn. omitted.) Thus, the court held, California's sentencing scheme, unlike Washington State's that was under review in *Blakely*, does not require jury findings of aggravating factors before the defendant may be sentenced to the upper term for an offense.

We adopt the reasoning and conclusion of the majority in *Wagener* and uphold the sentence here.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.